Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

October Term, 1993

OUTBOARD MARINE CORPORATION,
Petitioner,

v.

DAVID R. WOLTERING,
Administrator of the Estate
of Stacey Lee Grace,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS,
FIFTH DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER FEDERAL MARITIME LAW APPLIES TO A PRODUCT LIABILITY ACTION ARISING OUT OF THE DEATH OF A PASSENGER THROWN FROM AND STRUCK BY A RECREATIONAL BOAT ON NAVIGABLE WATERS.

II. WHETHER NON-DEPENDENT SURVIVORS OF A NON-SEAMAN MAY RECOVER LOSS OF SOCIETY DAMAGES IN A GENERAL MARITIME WRONGFUL DEATH ACTION.

RULE 29.1 STATEMENT OF INVOLVED PARTIES

Petitioner Outboard Marine Corporation (OMC) has no parent corporation. Its only subsidiary that is not wholly owned is Skipper Bud's of Illinois, Inc., which is owned 75% by OMC and 25% by Skipper Bud's of Wisconsin, Inc., a corporation unaffiliated with OMC.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT

Petitioner Outboard Marine Corporation ("OMC") respectfully petitions for a writ of certiorari to review the judgment of the Appellate Court of Illinois (hereafter "the Appellate Court"), review of which was denied by the Illinois Supreme Court.

OPINIONS BELOW

The opinion of the Appellate Court (App., *infra*, A1-A7) is reported at 615 N.E.2d 86 (Ill. Ct. App. 1993). The Illinois Supreme Court's order denying OMC's petition for leave to appeal (App. A8) is unreported. The order of the Circuit Court for Madison County granting OMC's motion for partial summary judgment (App. A11) is also unreported.

JURISDICTION

The order of the Illinois Supreme Court denying OMC's timely filed petition for leave to appeal from the judgment of the Appellate Court was entered on October 6, 1993. (App. A8) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

This Court held in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), that the final judgment requirement is to be interpreted liberally so as to serve the legislative goal of permitting Supreme Court review of important federal questions that come up through the state court system. This case fits the fourth exception to the final judgment rule described in *Cox*, 420 U.S. at 482-86. The federal question presented has been finally decided by the Illinois state courts. If OMC prevails on the merits on non-federal grounds in subsequent proceedings in the trial court, there will not be another opportunity for this Court to review the federal issue. Moreover, reversal of the Appellate Court on the federal issue would preclude further litigation on plaintiff's claims for recovery on behalf of the decedent's non-dependent survivors. Finally, if the Appellate Court decision is not reviewed and reversed, the constitutionally-based policy of uniformity in the application of maritime law across the country will be eroded.

CONSTITUTIONAL PROVISION INVOLVED

Article III, § 2, cl. 1, of the United States Constitution provides in relevant part: "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction;. . . ."

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This products liability action arises out of an accident that occurred on April 27, 1989, while plaintiff's decedent was a passenger on a pleasure boat which was being operated on the Mississippi River at or near mile marker 222 in St. Charles County, Missouri. The complaint alleges that the decedent, Stacey Grace, was ejected from the boat and struck by the propeller of the outboard motor, causing injuries which resulted in her death.

The decedent was 23 years old at the time of her death. She left no surviving spouse or children. The next of kin claiming an interest in this litigation are her father, David Woltering, and a sister, Sheila Martin. It is undisputed that decedent's next of kin were not at the time of her death dependent upon her for financial support.

Plaintiff David Woltering, as administrator of the Estate of Stacey Lee Grace, sued Outboard Marine Corporation ("OMC"), the manufacturer of the outboard motor, claiming that the outboard motor was defective because it lacked "a propeller guard or shroud." Plaintiff sought damages for wrongful death, including damages for deprivation of "decedent's companionship, guidance, advice,

love and affection."[1] Complaint, Counts I and III (App. A15-A18, A22-A25). OMC filed a motion for partial summary judgment on Counts I and III on the ground that federal maritime law governed the case and precluded recovery of damages for loss of society by non-dependents. The Circuit Court for Madison County, the Honorable A. A. Matoesian presiding, granted defendant's motion. (App. A11) Judge Matoesian further concluded, pursuant to Illinois Supreme Court Rule 308(a), that his ruling raised a question of law as to which there was substantial ground for difference of opinion, and that immediate appeal might materially advance the ultimate termination of the litigation. He defined that question of law as "whether Federal Admiralty Law governs and, if so, does general Maritime Law preclude recovery for loss of society damages in a wrongful death action based on products liability." (App. A9-A10)

The Appellate Court granted plaintiff's application for leave to appeal. On June 16, 1993, it reversed the trial court's order granting partial summary judgment, holding that federal maritime law did not apply to the case because "aquatic recreation involving a pleasure boat" did not have a "significant relationship to traditional maritime activity" where there was no evidence in the record "that negligent navigation played a role in the accident." 615 N.E.2d at 88-89 (App. A3, A5, A6). The Appellate Court did not reach the issue of whether federal maritime law, if applied, would

[1] For purposes of this petition, these elements of damages shall be collectively referred to as "loss of society," which embrace the broad range of mutual benefits a family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort and affection. *See Truehart v. Blandon*, 672 F. Supp. 929, 932 (E.D. La. 1987).

preclude plaintiff's recovery for loss of society. The Illinois Supreme Court denied OMC's timely filed petition for leave to appeal from the Appellate Court judgment. (App. A8)

REASONS FOR GRANTING THE PETITION

I. THE APPELLATE COURT HOLDING THAT FEDERAL MARITIME LAW DOES NOT APPLY TO THIS RECREATIONAL BOATING CASE MERITS REVIEW BY THIS COURT BECAUSE IT CONTRAVENES ESTABLISHED SUPREME COURT PRECEDENT, IS IN DIRECT CONFLICT WITH THE DECISIONS OF OTHER STATE AND FEDERAL COURTS, AND THUS THREATENS TO UNDERMINE THE UNIFORMITY MANDATED BY THE CONSTITUTION.

This Court has long recognized the "constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.'" *Moragne v. States Marine Lines*, 398 U.S. 375, 402 (1970), *quoting The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1874). The Court has also recognized the critical importance of its role in shaping that body of law and in guiding the state and federal courts as to the scope of its application.

The refusal of the Appellate Court to apply maritime law to this accident involving the death of a passenger thrown from and struck by a recreational boat on navigable waters is but the latest attempt by a lower court to carve out an exception to the uniform application of maritime law. The Appellate Court's declaration that maritime law does not govern a case involving "aquatic recreation involving a pleasure boat" in the absence of evidence of negligent

navigation, flies in the face of three decades of Supreme Court precedent rejecting attempts to limit the scope of maritime law in cases involving vessels on navigable waters. It is also directly contrary to several state and lower federal court decisions.

If the Appellate Court's decision is allowed to stand, the constitutionally mandated development of "uniform rules of maritime conduct and liability" which extend to all "activities traditionally undertaken by vessels, commercial or non-commercial," *Sisson v. Ruby*, 497 U.S. 358, 367 (1990), will be thwarted. For these reasons, review is essential to correct the insupportable holding of the Appellate Court and to assure that maritime law is applied uniformly in future litigation involving recreational boating.

A. This Court Has Recognized that the Constitutionally Mandated Interest in the Uniformity of Maritime Law Demands Rejection of a Fact-Dependent Analysis in Determining Whether Maritime Law Should Apply to a Given Case.

In 1972, this Court decided the first of a series of cases in which it reaffirmed the importance of a uniform body of maritime law, and sought to provide guidance to the lower courts in determining when that body of law should apply to a tort occurring on navigable waters. In *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), the Court held that in order for maritime law to apply, the activities giving rise to the case must have a "nexus," *i.e.*, bear "a significant relationship," to "traditional maritime activity." *Id.* at 268.

Executive Jet spawned an entire generation of litigation which pondered just how much "nexus" was required. Some courts interpreted this test to mean that recreational boaters were excluded from the application of maritime law. But in *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982), which involved a collision between two small recreational boats on the Amite River in Louisiana, this Court rejected the attempted commercial/recreational distinction and declared the paramount interest of maritime law in any case that involved a collision on navigable waterways:

> . . . The federal interest in protecting maritime commerce cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually *engaged* in commercial maritime activity. This interest can be fully vindicated *only* if *all* operators of vessels on navigable waters are subject to uniform rules of conduct. The failure to recognize the breadth of this federal interest ignores the potential effect of noncommercial maritime activity on maritime commerce. . . .
>
> . . . We decline to inject the uncertainty inherent in such line-drawing into maritime transportation. Moreover, the smooth flow of maritime *commerce* is promoted when *all* vessel operators are subject to the same duties and liabilities.

Id. at 675-77 (emphasis in original).

Foremost did not, however, end the controversy among lower courts struggling to define the *Executive Jet* "nexus." Over the years the variety of analyses employed by the courts gave rise to more rather than less confusion

regarding the breadth of *Foremost*. See, *e.g.*, the four-factor test adopted in *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974), and *Oman v. Johns-Manville Corp.*, 764 F.2d 224 (4th Cir.), *cert. denied*, 474 U.S. 970 (1985). Considerable judicial resources were spent delving into the factual intricacies in each case as the courts attempted to ascertain whether there was sufficient "nexus" to apply maritime law. Plaintiffs argued that Foremost should be limited to cases involving a navigational error or a collision. The plethora of inconsistent decisions that resulted threatened to undermine the constitutional goal of uniformity.

Accordingly, in *Sisson v. Ruby*, 497 U.S. 358 (1990), this Court once again was called upon to clarify the scope and application of maritime law. *Sisson* involved a 56-foot pleasure sailboat docked at an entirely recreational marina on a navigable waterway in Lake Michigan. A fire erupted in the washer/dryer unit in the sailboat and destroyed Sisson's vessel as well as several neighboring recreational vessels and portions of the marina. This Court found maritime law applicable to the incident.

In so doing, the Court refined the two-part test it had announced in *Foremost*. It stated that the requisite analysis must focus on whether the *general type* of harm-producing event has a potentially disruptive effect on maritime commerce, and whether the *general type* of activity bears a significant relationship to maritime activity. 497 U.S. at 362-63.

Respondents in *Sisson* argued that the fire had no potential effect on maritime commerce because the boat was a recreational boat docked at a marina used entirely by

recreational boaters. The Court rejected this narrow "fact-specific" analysis:

> This argument misunderstands the nature of our inquiry. We determine the potential impact of a given type of incident by examining its general character. The jurisdictional inquiry does not turn on the actual effects on maritime commerce of the fire on Sisson's vessel; nor does it turn on the particular facts of the incident in this case, such as the source of the fire or the specific location of the yacht at the marina, that may have rendered the fire on the *Ultorian* more or less likely to disrupt commercial activity. Rather, a court must assess the general features of the type of incident involved to determine whether such an activity is likely to disrupt commercial activity.

Id. at 363. Thus, in analyzing the requirement of "potential disruptive impact on maritime commerce," the specific facts of the case were immaterial. Instead, the relevant inquiry was the "general features of the type of incident." It was not important that *Sisson* involved a "washer/dryer fire" but rather that it involved "a fire on a vessel docked at a marina on navigable waters."

With respect to the second part of the test, a significant relationship to traditional maritime activity, the Court once again emphasized the "broad perspective" demanded by its approach:

> Our cases have made clear that the relevant "activity" is defined not by the particular circumstances of the incident, but by the general conduct from which the incident arose. . . . Thus, in this case, we need not ascertain the precise cause of the fire to determine what "activity" Sisson was engaged in; rather, the relevant activity was the storage and maintenance of a vessel at a marina on navigable waters. [Footnote omitted.]
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> * * *
>
> . . . [A] narrow focus on navigation would not serve the federal policies that underlie our jurisdictional test. . . . The need for uniform rules of maritime conduct and liability is not limited to navigation but extends at least to any other activities traditionally undertaken by vessels, commercial or noncommercial.

Id. at 364-65, 367.

Thus, the Court found maritime law to apply even though (a) the boat was recreational rather than commercial, (b) the boat was not moving or navigating, (c) the dock was located at an entirely recreational marina, (d) there was no collision, and (e) the origin of the fire appeared to be a garden variety household appliance. In short, the Court "eschew[ed] the fact-specific jurisdictional inquiry" that had enmeshed the lower courts and had artificially limited the

proper scope of maritime law application. *Id.* at 364.[2] In its place, the Court embraced a broad perspective consonant with its commitment to uniformity in this area.

B. The Appellate Court's Fact-Dependent Analysis and Holding in this Case Directly Contravene *Foremost* and *Sisson* and the State and Lower Federal Court Decisions Following Those Precedents.

Lower court rulings which have taken *Foremost* and *Sisson* to heart have rejected invitations to conduct a fact-dependent analysis and have built a consistent record on the application of maritime law where the accident involves a recreational vessel on navigable waterways. However, the decision of the Appellate Court that maritime law will not be applied to this boating accident defies this Court's decisions and directly conflicts with the decisions of other state and lower federal courts.

1. This Case Unmistakably Meets the Criteria of *Foremost* and *Sisson*.

In the present case, the decedent, a passenger on a pleasure boat, was fatally injured when she was thrown or fell overboard and was struck by the propeller of the boat's outboard motor. Application of the *Foremost/Sisson* two-part analysis mandates the conclusion that maritime law must apply.

[2] In fact, the struggle of the lower courts even caused some on the *Sisson* court to suggest a return to the pre-*Executive Jet* locality test, under which any tort occurring on navigable waters was considered subject to maritime law. 497 U.S. at 503 (Scalia, White, JJ., concurring).

First, the general type of event -- the ejection of a passenger from a vessel and the subsequent collision of that vessel with the passenger -- is the type of event that can have a potentially disruptive effect on maritime commerce just as surely as the collision of two recreational boats can have such an effect. Such an event at the mouth of the Saint Lawrence Seaway (to use the hypothetical setting suggested by the Court in *Foremost*, 457 U.S. at 675) could wreak havoc not only through the maneuvers of vessels attempting to avoid striking the person in the water (or attempting to avoid striking vessels which in turn were attempting to avoid striking the person in the water), but also through the subsequent emergency rescue and recovery efforts.

Second, the general type of activity involved here -- the operation and navigation of a pleasure boat on navigable waters -- has been specifically found by this Court to have a "substantial relationship to traditional maritime activity." *Foremost*, 457 U.S. at 675, n.5.

In concluding that this case failed to meet the second prong of the *Sisson* test, the Appellate Court apparently found it significant that "the record was devoid of evidence that negligent navigation played a role in the accident." This rationale must fail for at least three reasons. First, *Sisson* explicitly rejected any requirement of navigational error as a prerequisite for the application of maritime law. *See* 497 U.S. at 365-67. Second, product liability claims arising out of maritime accidents are also subject to federal maritime law. *See, e.g., Wahlstrom v. Kawasaki Heavy Industries*, 4 F.3d 1084, 1089 (2d Cir. 1993) (federal maritime law governed products liability action against jet ski manufacturer arising from collision between jet ski and motorboat); *Anderson v. Whittaker Corp.*, 692 F. Supp. 764,

768 (W.D. Mich. 1988), *aff'd in part, rev'd in part on other grounds*, 894 F.2d 804 (6th Cir. 1990).[3]

Third, the *Sisson* court refused to engage in *any* inquiry into causation. "Were courts required to focus more particularly on the causes of the harm, they would have to decide to some extent the merits of the causation issue to answer the legally and analytically antecedent jurisdictional question." *Id.* at 365.

In the instant case, the Appellate Court did not have and should not have needed a full accounting of the evidence that might be adduced at trial on the causes of this accident, including what operational errors may have caused Ms. Grace to fall from the boat and/or be struck by it. While the plaintiff in this case did not choose to state a claim against the operator of the boat, such incidents often do give rise to claims that it was the manner in which the boat was operated that led to the ejection of or collision with the decedent. In fact, nothing would preclude OMC from making such a claim in this case. In view of the commitment to uniformity underlying the *Sisson* analysis, it is clearly improper to distinguish between otherwise identical accidents simply on the basis of whether, at the time the issue of the application of maritime law is raised, there happens to be evidence in the record of negligent operation of the boat.

2. The Appellate Court Decision Conflicts with Other State and Federal

[3] Indeed, maritime law has a products liability component precisely to address such claims. *See* 2 BENEDICT ON ADMIRALTY § 216 (1993) (entitled "Products Liability").

Court Decisions in Cases Involving Recreational Boating Accidents.

In stark contrast to the Appellate Court (and, by its silence, the Illinois Supreme Court), a number of state and federal courts have held that claims arising out of a variety of single and multiple-vessel recreational boating accidents should be governed by maritime law. Particularly apposite is *Complaint of Bird*, 794 F. Supp. 575, 580 (D.S.C. 1992), in which the federal district court applied the *Sisson* test and concluded that maritime law applied where a passenger on an anchored recreational boat fell overboard. *See also St. Hilaire Moye v. Henderson*, 496 F.2d 973, 979 (8th Cir.) (admiralty law applied in personal injury action where plaintiff was ejected from pleasure boat into the Arkansas River), *cert. denied*, 419 U.S. 884 (1974). Maritime law has also been held applicable to cases involving capsized boats, *Banchi v. Miller*, 388 F. Supp. 645 (E.D. Pa. 1974); *Anderson v. Whittaker Corp.*, 692 F. Supp. 764 (W.D. Mich. 1988), *aff'd in part, rev'd in part on other grounds*, 894 F.2d 804 (6th Cir. 1990); collisions between boats and swimmers, *Oliver v. Hardesty*, 745 F.2d 317 (4th Cir. 1984); *Medina v. Perez*, 733 F.2d 170 (1st Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985); collisions between a boat and a fixed object or obstruction, *Wilder v. Placid Oil Co.*, 611 F. Supp. 841 (W.D. La. 1985) (citing decisions of the Second, Third, Fourth, Fifth and Eighth Circuits); single boat accidents, *Hassinger v. Tideland Elec. Membership Corp.*, 781 F.2d 1022 (4th Cir.), *cert. denied*, 478 U.S. 1004 (1986); collisions between small motorboats and personal watercraft, *Wahlstrom v. Kawasaki Heavy Industries*, 4 F.3d 1084 (2d Cir. 1993); and accidents occurring while pleasure boats were tied to a dock, *American Eastern Dev. Corp. v. Everglades Marina*, 608 F.2d 123

(5th Cir. 1979); *In re Colquitt*, 1975 A.M.C. 981 (D. Md. 1975).

Thus, the Appellate Court's attempt to fend off the application of maritime law to this case cannot be reconciled with *Foremost* or *Sisson* or with the state and lower federal court cases that have followed this Court's lead. Furthermore, as the following section describes, in its search for precedent to support its decision, the Appellate Court effectively rewrote the holdings of a line of wholly inapposite cases. In so doing, it announced a rule that, if allowed to stand, would set back by more than a decade this Court's efforts to foster the uniformity of maritime law.

3. In Declaring that Maritime Law Does Not Apply to "Aquatic Recreation Involving a Pleasure Boat," the Appellate Court Improperly Invoked a Fact-Dependent Analysis Embraced by a Line of Cases Which Hold that Where an Anchored Vessel is Simply Being Used as a Floating Platform, Maritime Law May Not be Implicated.

The only precedent relied upon by the Appellate Court in support of its refusal to apply maritime law to this case was a line of cases involving anchored vessels that were being used not as vessels, but rather as platforms for launching other activities. Where injuries have occurred in conjunction with those activities, some courts have held that maritime jurisdiction was not triggered simply because the activities were initiated from boats. This line of cases was the source of the ruling in *Delta Country Ventures v. Magana*, 986 F.2d 1260 (9th Cir. 1993), the primary case upon which the Appellate Court relied.

Magana involved a guest who dived from the deck of a houseboat anchored in navigable waters, struck something under water, and sustained serious injuries. The Ninth Circuit found that the injured houseboat guest was "engaging in the activity of diving when he was injured." 986 F.2d at 1262. Citing the *Sisson* analysis, the court concluded that "aquatic recreation *off* a pleasure boat" was the activity that gave rise to the incident, and accordingly held that admiralty jurisdiction did not apply. *Id.* (emphasis added).

The cases relied upon by *Magana* have also, without exception, involved activities completed "off" of a stationary boat (*e.g.*, injuries resulting from scuba diving or diving), and *all have involved injuries which were in no way caused by the vessel itself. See, e.g., Foster v. Petticord*, 826 F.2d 1370, 1376 (4th Cir. 1987) (claims involving injuries sustained when plaintiff dived off a parked boat did not invoke admiralty jurisdiction because the case really involved activities "in which a pleasure boat was used as a diving platform"), *cert. denied*, 484 U.S. 1027 (1988); *Smith v. Knowles*, 642 F. Supp. 1137, 1140 (D. Md. 1986) (admiralty jurisdiction did not apply to a wrongful death action in which the decedent drowned when he dived overboard to urinate: "The defendant might as well have been estimating the depth of a swimming pool."); *American Nat'l. Bank & Trust Co. of Waukegan v. United States*, 636 F. Supp. 147, 150-51 (N.D. Ill. 1986) (diving from a private boat into a lake was not a traditional maritime activity subject to admiralty jurisdiction, noting that the boat "was not even involved in any manner with the injury suffered").

Whether this line of cases can survive a properly-conducted *Sisson* analysis is doubtful. With their emphasis on factual vagaries such as whether the boat was anchored, whether the injured person dived in voluntarily or fell off by

accident, and whether the precise actions of those involved could alternatively have been launched from a land-based platform, these cases engage in precisely the sort of fact-dependent, subtlety-laden analysis that *Sisson* rejected, the kind of analysis that is a recipe for confusion rather than a template for uniformity. *See Magana*, 986 F.2d at 1264 (Kozinski, J., dissenting); *see also Complaint of Bird*, 794 F. Supp. 575, 579 (D.S.C. 1992) (suggesting *Sisson* may have implicitly limited or overruled these cases because they narrowly define maritime tort jurisdiction for pleasure vessels).

But however problematic their approach, the *Magana* case and its predecessors had up to now never been extended beyond their limited context -- a person injured while engaged in activities off a stationary boat, where the boat itself was not the instrumentality of the injury. The instant case, however, is the mutant offspring of *Magana*. The Appellate Court took the fact-dependent analysis of *Magana* to its most troublesome extremes, and patently rewrote the *Magana* holding. Instead of standing for the very limited, and highly questionable, proposition that activities *off* of a *stationary* boat were not maritime, *Magana* has now been revised by the Appellate Court to declare sweepingly that "aquatic recreation *involving* a pleasure boat" is not maritime. 615 N.E.2d at 88 (App. A5)(emphasis added).

Even if *Magana* can be squared with *Sisson*, neither case can be read to deny the application of federal maritime law to an accident such as this one, where the decedent fell from a moving boat in navigable waters and was struck and killed by the boat itself. On the contrary, both *Foremost* and *Sisson* state that activities, recreational or otherwise, "involving" boats on navigable waters generally *are* subject to admiralty jurisdiction. The analytical struggle of the

Illinois Appellate Court to avoid federal maritime law, and the anomalous holding that resulted, bear witness to the incompatibility of the fact-dependent approach with this Court's commitment to uniformity. It is critical, therefore, that this decision not be allowed to stand as controlling precedent in Illinois, or as a misguiding beacon in other jurisdictions.

C. The Appellate Court's Decision Poses a Threat to Uniformity That is of Substantial Practical Importance.

The ramifications of the Appellate Court decision go far beyond the four corners of this case. The state of Illinois alone, with Lake Michigan and the Mississippi River on its borders and numerous important rivers within,[4] has thousands of miles of navigable waterways used for recreational boating. Statistics kept by the United States Coast Guard on accidents involving recreational boats reveal that during 1992 there were at least 79 reported accidents, including 13 fatal accidents, occurring in waters of joint federal/state jurisdiction in Illinois alone. *Boating Statistics 1992*, U.S. Dep't. of Transp. -- U.S. Coast Guard, at 10 (June 1993).[5] During the period 1988-1992, recreational boating accidents in all Illinois waters totalled over 500, including over 100 fatal accidents. *Id.* at 13. Assuming the geographic distribution of the accidents during that five-year period was roughly the same as in 1992 (*Id.* at 10), the

[4] *See* 92 Illinois Administrative Code, Ch. I, § 704.Appendix A (reproduced in pertinent part at App. A34-A41).

[5] For the Court's reference, this document has been lodged with the Clerk of Court along with this Petition.

overwhelming majority of those accidents occurred in waters of joint federal/state jurisdiction.

For the inevitable litigation in the Illinois courts arising out of these recreational boating accidents in navigable waters, the Appellate Court pronouncement that "aquatic recreation involving a pleasure boat" is not a maritime activity remains controlling precedent. Therefore, unless this Court corrects the Appellate Court's error, the state of Illinois will remain a conspicuous breach in the uniform treatment of maritime cases nationwide.

But the potential effect of the Appellate Court decision is not limited to Illinois. Nationwide, there were at least 3,278 reported recreational boating accidents during 1992 occurring in waters of joint federal/state jurisdiction. *Boating Statistics 1992* at 10. Numerous accidents involved, as did this case, a passenger falling overboard and/or the boat striking a person in the water. *Id.* at 12. Plaintiffs in cases arising out of recreational boating accidents upon navigable waterways have already seized upon the rationale and result of the Appellate Court to challenge the application of maritime law in their cases. See, *e.g.*, Appellant's Motion to Enlarge Time to Supplement Argument and Table of Authorities in the case of *Choat v. Kawasaki Motors Corp.*, No. 1920544 (Ala.), in which a plaintiff, who seeks to reverse the trial court's holding that admiralty jurisdiction was proper, has cited the *Woltering* decision in her pending appeal to the Alabama Supreme Court. (App. A42-A47)

Thus, the Appellate Court decision should be reviewed not only because it is contrary to Supreme Court precedent and in conflict with the decisions of other state and federal courts, but also because it represents a significant

threat to uniformity in the application of maritime law in the state of Illinois and nationwide.

II. MARITIME LAW PRECLUDES RECOVERY OF DAMAGES FOR LOSS OF SOCIETY TO THE NON-DEPENDENT SURVIVORS OF DECEDENT.

Because the Appellate Court erroneously concluded that maritime law did not govern this case, it applied Illinois wrongful death law and held that the non-dependent survivors of Stacey Grace were entitled to claim damages for loss of society. Since maritime law does in fact apply to this case, the issue of what damages are permitted under that body of law must be faced.

This Court has never addressed the specific question of whether non-dependent survivors of a person killed in a maritime accident that is neither subject to the Death on the High Seas Act (DOHSA) or the Jones Act are entitled to recover damages for loss of society when such damages are denied to DOHSA and Jones Act claimants.[6] However, the principles enunciated by this Court in other cases, and the consistent rulings of lower courts that have addressed the specific question presented here, make it clear that the non-dependent survivors of the decedent in this case may not recover damages for loss of society.

[6] The Jones Act, 46 U.S.C. app. § 688 (1988), provides the exclusive remedy for "seamen" against their employers for deaths caused during commercial maritime activity. The Death on the High Seas Act, 46 U.S.C. app. §§ 761-768 (1988), allows recovery for deaths occurring outside state territorial waters. Both statutes are by their terms exclusive remedies, precluding recovery under state wrongful death statutes. Both statutes allow recovery only to dependents of the decedent, and only for their pecuniary losses.

A. Where Maritime Law is Applicable, it Preempts State Common Law and Statutory Remedies.

In *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), this Court sought to render maritime wrongful death law uniform "by creating a general maritime wrongful death action applicable in all waters," thereby removing "the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts." *Id.* at 402.

Since *Moragne*, the courts have consistently held that maritime law supplants state law in general maritime actions for wrongful death arising in state territorial waters. *See, e.g., Matter of S.S. Helena*, 529 F.2d 744, 753 (5th Cir. 1976); *Anderson v. Whittaker Corp.*, 692 F. Supp. 764, 767-69 (W.D. Mich. 1988), *aff'd in part, rev'd in part on other grounds*, 894 F.2d 804 (6th Cir. 1990); *Truehart v. Blandon*, 672 F. Supp. 929, 935-36 (E.D. La. 1987); *Gilmore v. Witschorek*, 411 F. Supp. 491, 494 (E.D. Ill. 1976); *Lipworth v. Kawasaki Motors Corp., U.S.A.*, 592 So. 2d 1151, 1152-53 (Fla. Dist. Ct. App.), *cert. denied*, 113 S. Ct. 465 (1992); *Texaco Refining and Marketing v. Estate of Dau Van Tran*, 808 S.W.2d 61, 64 (Tex.), *cert. denied*, 112 S. Ct. 301 (1991); *Sanders v. Richmond*, 579 S.W.2d 401, 407-08 (Mo. Ct. App. 1979).

Furthermore, the displacement and preemption of state wrongful death remedies is not limited to those instances where there is direct conflict between state law and maritime law. *See Wahlstrom v. Kawasaki Heavy Industries*, 4 F.3d 1084, 1087 (2d Cir. 1993). Once maritime law is found to be applicable, it is exclusive and may not be supplemented by a patchwork of state rights and remedies.

B. Plaintiff May Not Recover Damages for Loss of Society in this Case Because Maritime Law Limits Recovery to Dependents of the Deceased.

The courts which have addressed the measure of damages recoverable in a general maritime wrongful death action have fashioned a logical, uniform approach that furthers the goals of *Moragne* and is consistent with federal maritime statutes. That approach follows the lead of the Jones Act and DOHSA in distinguishing between dependents and non-dependents, allowing recovery to the former but not to the latter.

Thus, in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), this Court held that, in view of the Jones Act and DOHSA limitations on recovery to actual pecuniary losses, it could not sanction more expansive remedies for general maritime wrongful death actions brought under *Moragne*. Therefore, non-dependent survivors bringing a general maritime wrongful death action would not be permitted to recover damages for loss of society.

While *Miles* involved the death of a seaman, the lower courts have consistently recognized that any attempt to limit or distinguish the holding on that basis must fail in light of the *Moragne* goal of uniformity in the scope of damages recoverable in a general maritime death claim. Accordingly, those courts have concluded that non-dependents may not recover loss of society damages, regardless of whether the claim arises under *Moragne*, the Jones Act, or DOHSA, and regardless of whether the decedents were seamen or non-seamen. *See, e.g.*, *Wahlstrom*, 4 F.3d at 1090 (denying recovery to non-dependent parents of a minor killed in a jet-

ski accident); *Truehart*, 672 F. Supp. at 935 (denying loss of society damages to non-dependent survivors of a pleasure boat passenger killed in territorial waters); *Cantore v. Blue Lagoon Water Sports, Inc.*, 799 F. Supp. 1151, 1152 (S.D. Fla. 1992) (loss of society damages denied to non-dependent survivors of individual who died in a collision between two personal watercraft); *In re Cambria Steamship Co.*, 353 F. Supp. 691, 696 (N.D. Ohio 1973)(non-dependent relatives may not recover), *aff'd sub nom Complaint of Cambria Steamship Co.*, 505 F.2d 517 (6th Cir. 1974), *and cert. denied*, 420 U.S. 975 (1975); *Texaco Refining*, 808 S.W.2d at 63-64 (denying recovery for loss of society to survivors of "good samaritan" killed when he stopped to help a boat owner free his propeller); *Lipworth*, 592 So.2d at 1152-53 (denying recovery in product liability action to non-dependent parents of a young girl killed in a jet ski accident).

Thus, application of maritime law to this case preempts state wrongful death remedies. Further, maritime law precludes recovery by non-dependents of damages for loss of society. Therefore, reversal of the Appellate Court's erroneous holding on the application of maritime law mandates reversal of its judgment altogether, and reinstatement of the trial court order granting partial summary judgment to OMC on plaintiff's claims for loss of society damages.

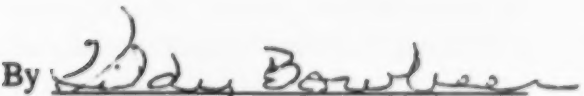
CONCLUSION

For the reasons stated, the Appellate Court's decision is insupportable. It flies in the face of this Court's opinions in *Foremost* and *Sisson*, as well as a host of lower court rulings. To leave the Appellate Court decision intact is to re-open the door to the fact-dependent, highly result-oriented

approach that this Court has rejected, an approach that is fundamentally at odds with the constitutionally mandated "system of [maritime] law coextensive with, and operating uniformly in, the whole country." Accordingly, this Court should grant this Petition for Certiorari.

Respectfully submitted,

BOWMAN AND BROOKE

By 

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January 4, 1994

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No. 5-92-0248

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

DAVID R. WOLTERING, Administrator of the Estate of Stacey Lee Grace, deceased,	)	Appeal from the Circuit Court of Madison County
Plaintiff-Appellant,	)	No. 90-L-193
v.	)	Honorable A.A. Matoesian, Judge Presiding.
OUTBOARD MARINE CORPORATION,	)	
Defendant-Appellee.	)	

JUSTICE MAAG delivered the opinion of the court:

The plaintiff, David R. Woltering, administrator of the estate of Stacey Lee Grace, deceased, petitioned this court pursuant to Illinois Supreme Court Rule 308 for leave to appeal an order of the circuit court of Madison County granting partial summary judgment to the defendant, Outboard Marine Corporation. We granted the plaintiff's petition for leave to appeal.

This case arises out of an accident which occurred on April 27, 1989. The complaint alleges that Stacey Lee Grace was a passenger on a pleasure craft being operated on the Mississippi River near St. Charles County, Missouri. She was thrown from the boat and apparently struck by the propeller of the outboard motor. This outboard motor was manufactured by the defendant, Outboard Marine Corporation. At the time of her death, Stacey Lee Grace was unmarried and left no surviving children. The next of kin claiming an interest in this litigation are her father and her sister.

Prior to her death, Stacey Lee Grace lived in an apartment in the basement of her parent's home and paid them $100 per month in rent. Neither her father nor sister were financially dependent upon the decedent. They have, however, claimed damages due to their loss of companionship, guidance, advice, love, and affection for the decedent.

We are confronted with two issues in this case. First, we must decide whether Federal admiralty law or State substantive law applies. Second, regardless of whether Federal admiralty law applies or State law applies, we must determine the correct measure of damages given the facts of this case.

A trilogy of United States Supreme Court cases provide guidance in determining whether this case as pleaded arises under Federal admiralty law or under State products liability law. The United States Supreme Court in Executive Jet Aviation, Inc. v. City of Cleveland (1972), 409 U.S. 249, 34 L.Ed.2d 454, 93 S.Ct. 493, established a two-part test for determining whether a case falls within the admiralty law jurisdiction. The supreme court held that it first must be

ascertained whether the tortious wrong occurred on navigable waters. If, in fact, the alleged wrong occurred on navigable waters, then the court must determine whether there is a significant relationship between the wrong and traditional maritime activity.

In Foremost Insurance Co. v. Richardson (1982), 457 U.S. 668, 73 L.Ed.2d 300, 102 S.Ct. 2654, the Supreme Court reiterated the previously stated rule. It emphasized that admiralty jurisdiction is limited by the requirement that the wrong must bear a significant relationship to traditional maritime activity. The court held that the collision of two pleasure boats on navigable waters because of negligent operation did constitute a sufficient nexus to traditional maritime activity to sustain admiralty jurisdiction. The Supreme Court recognized that, although the primary focus of admiralty jurisdiction is the protection of maritime commerce, all vessel operators must be subject to uniform rules of conduct on navigable waters. To ignore this fact would ignore the potential impact of noncommercial maritime activity on maritime commerce. Richardson, 457 U.S. at 674-75, 73 L.Ed.2d 300, 102 S.Ct. 2654.

The final case in the trilogy is Sisson v. Ruby (1990), 497 U.S. 358, 111 L.Ed.2d 292, 110 S.Ct. 2892. In Sisson, a fire broke out aboard a yacht docked at a marina. The yacht was destroyed along with several neighboring vessels and the marina. The fire itself apparently started in the area of a washer/dryer unit. The Supreme Court was confronted with the question of whether Federal admiralty jurisdiction could be invoked under those facts. The court found that admiralty jurisdiction was present despite the fact that no commercial vessels were involved. The court reasoned that a fire has a "potentially disruptive impact on maritime commerce" because of the potential of it spreading to

commercial vessels and because the damage to the marina could make it inaccessible to commercial vessels. (Sisson, 497 U.S. at 363, 111 L.Ed.2d 292, 110 S.Ct. 2892.) Therefore, the court held that since both the locality test, that is, an alleged wrong occurring on navigable waters, and the nexus test, a substantial relationship to traditional maritime activities, were satisfied, Federal admiralty jurisdiction was proper.

We must now apply these rules to the facts of this case. We have considered the authorities cited by the parties and conclude that Federal admiralty law does not apply in this case.

We do not reach this conclusion because of the absence of an allegation of negligent navigation. As the defendant correctly points out, a claim of improper navigation is only one factor to consider in determining whether admiralty jurisdiction is present. Sisson is an excellent example of a case where there is no allegation of improper navigation and yet admiralty jurisdiction was found to exist.

Rather, we reach the conclusion that this case does not fall within the admiralty jurisdiction because there is an insufficient relationship to traditional maritime activity. In Delta Country Ventures, Inc. v. Magana (9th Cir. 1993), 986 F.2d 1260, the plaintiff dove from the deck of a houseboat and struck something underwater, sustaining serious injuries. The boat had been leased for recreational use, and the plaintiff was on the boat as a guest. One of the issues in the case was whether the admiralty jurisdiction of the court was implicated. The United States Court of Appeals for the Ninth Circuit stated:

> "In Sisson, the Supreme Court stated that 'protecting commercial shipping is at the heart of admiralty jurisdiction' and '[n]ot every accident in navigable waters that might disrupt maritime commerce will support federal admiralty jurisdiction.' [Citation.] The Court then set forth a two-step inquiry for determining whether jurisdiction exists: First, we 'assess the general features of the type of incident involved to determine whether such an incident is likely to disrupt commercial activity.' [Citation.] Second, we ask whether the party seeking to invoke maritime jurisdiction has shown 'a substantial relationship between the activity giving rise to the incident and traditional maritime activity.'" 986 F.2d at 1262.

Applying this test, the court in Magana defined the relevant activity as "aquatic recreation off a pleasure boat ***." The court concluded that "aquatic recreation off a pleasure boat" was not sufficiently related to traditional maritime activity to support admiralty jurisdiction.

Similarly, in the instant case we must define the activity taking place at the time of the injury, and we hold that the relevant activity giving rise to the incident was aquatic recreation involving a pleasure boat.

A decision closely paralleling the facts of this case is Kunreuther v. Outboard Marine Corp. (E.D.Pa. 1989), 715 F.Supp. 1304. In the Kunreuther case, plaintiff's decedent was snorkeling in Jamaican waters when she was struck by a propeller from an Evinrude outboard motor. The plaintiff alleged that the outboard motor should have been equipped

with a propeller guard. The identical allegation is made by the plaintiff in this case. The United States district court, after analyzing the law of admiralty jurisdiction, concluded that under the facts of that case admiralty jurisdiction did not lie.

The Federal district court later withdrew this decision and concluded that the Death on the High Seas Act (Act)(46 U.S.C.A. § 761 et seq. (West 1975 & Supp. 1993) must be applied. However, the court did not retreat from its prior ruling that in the absence of the Act Federal admiralty law should not apply. (Kunreuther v. Outboard Marine Corp. (E.D.Pa. 1991), 757 F.Supp. 633.) In this case, there is no claim that the Act is involved.

We reach the same conclusion as the courts in Magana and Kunreuther. Admiralty law does not apply in this case. Rather, Illinois law applies. We reach this conclusion because only the locality test has been met. The second prong of the two-part jurisdictional test, a significant relationship to traditional maritime activity, has not been satisfied. Magana, 986 F.2d at 1262.

The defendant has cited several cases that at first blush seem to conflict with Magana and Kunreuther. However, nearly all of the authorities cited involved a collision between vessels or some other form of negligent navigation. While negligent navigation is not necessary to invoke admiralty jurisdiction, its presence strongly suggests the propriety of applying admiralty law. (Foremost, 457 U.S. at 675 n.5, 73 L.Ed.2d at 306 n.5., 102 S.Ct. at 2658 n.5.) In this case, the record is devoid of any evidence that negligent navigation played a role in the accident.

Given the fact that we have concluded that Illinois law applies to this case, we must now determine whether loss of society damages are recoverable. It is clear that loss of society damages for the death of an adult child are recoverable. (See Ballweg v. City of Springfield (1986), 114 Ill.2d 107, 120, 499 N.E.2d 1373.) The Illinois Supreme Court has stated that Illinois law recognizes that pecuniary losses encompass loss-of-society damages for many facets of family relationships. (Seef v. Sutkus (1991), 145 Ill.2d 336, 338, 583 N.E.2d 510, 511.) Recently, the Illinois Supreme Court recognized that a proven loss of sibling's society is a pecuniary injury for which siblings can recover under the wrongful death statute. (In re Estate of Finley (1992), 151 Ill.2d 95, 103, 601 N.E.2d 699, 702.) Therefore, siblings may recover for loss of society of a deceased brother or sister, but such damages must be proven. (Finley, 151 Ill.2d at 106, 601 N.E.2d at 699.) We find that loss-of-society damages are recoverable in this case.

Accordingly, the partial summary judgment entered by the circuit court of Madison County is hereby reversed, and the cause is remanded for further proceedings consistent with this decision.

Reversed and remanded.

GOLDENHERSH, J., and W. A. LEWIS, J., concur.

ILLINOIS SUPREME COURT
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SUPREME COURT BUILDING
SPRINGFIELD, ILL 62706
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October 6, 1993

Mr. William A. Schmitt
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No. 75831 - David R. Woltering, Adm'r., etc., respondent, v. Outboard Marine Corporation, petitioner. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIES the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 28, 1993.

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

DAVID R. WOLTERING, Administrator of the Estate of Stacey Lee Grace, deceased,	)	
Plaintiff,	)	Case No. 90-L-193
v.	)	
OUTBOARD MARINE CORPORATION,	)	
Defendant.	)	

ORDER

Pursuant to Supreme Court Rule 308, the Court hereby finds that the Order of March 20, 1992, granting Defendant's Motion for Partial Summary Judgment involves a question as to which there is substantial grounds for difference of opinion and that immediate appeal may materially advance the ultimate termination of the litigation. The question of law involved is whether Federal Admiralty Law governs and, if so, does general Maritime Law preclude

recovery for loss of society damages in a wrongful death action based on products liability.

/s/ A.A. Matoesian
Honorable A.A. Matoesian
Circuit Judge

ENTERED: 03/31/92

THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Woltering — No. 90-L-193

Plaintiff

Div.

vs.

Outboard Marine Corporation

ORDER

Upon motion of defendant, OMC, for partial summary judgment on plaintiff's claims for damages for loss of society, and the Court, having heard arguments of counsel, considered the motion, and matters filed in support of and opposition hereto, finds that said motion should be and is hereby allowed.

It is therefore Ordered that summary judgment is Granted in favor of defendant on Counts I and III of plaintiff's Complaint seeking damages for "companionship, guidance, advice, love and affection."

Date: 03/20/92

/s/ A.A. Matoesian
Honorable A.A. Matoesian
Circuit Judge

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

DAVID R. WOLTERING, Administrator of the Estate of Stacey Lee Grace, deceased,	)	
Plaintiff,	)	Case No. 90-L-193
v.	)	
OUTBOARD MARINE CORPORATION,	)	
Defendant.	)	

MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFF'S CLAIMS FOR DAMAGES FOR LOSS OF SOCIETY

Defendant, Outboard Marine Corporation ("OMC"), pursuant to Ill.Rev.Stat., ch. 110, § 2-1005(d), moves the Court for Summary Judgment on Counts I and III of plaintiff's Complaint, to the extent plaintiff alleges, and seeks to recover non-pecuniary losses as damages in this lawsuit, UPON THE GROUNDS THAT:

1. Plaintiff has filed a multi-Count Complaint against OMC, alleging that plaintiff's decedent was a passenger in a boat being operated on the Mississippi River on April 27, 1989, when she was thrown from the boat and sustained injuries resulting in her death.

2. Counts I and III of the Complaint are brought by David Woltering as Administrator of decedent's estate, and seek damages for wrongful death, including the loss of "companionship, guidance, advice, love and affection of the decedent."

3. However, as a matter of law, there is no right of recovery for damages for such loss of society under general maritime law in actions for wrongful death.

4. In support of this motion, defendant submits herewith:

(A) True and correct copies of plaintiff's responses to OMC's Interrogatories nos. 2 and 26 (marked as Defendant's Exhibit #1, 10/18/91).

(B) True and correct copies of pertinent pages of the sworn depositions of David Woltering and Sheila Martin, taken October 18, 1991.

(C) Memorandum in Support of this Motion for Partial Summary Judgment on Plaintiff's Claims for Damages for Loss of Society.

WHEREFORE, defendant, Outboard Marine Corporation, respectfully submits that there is no genuine issue of material fact, and that it is entitled to judgment, as a matter of law, on Counts I and III of plaintiff's Complaint, to the extent plaintiff seeks damages for the loss of decedent's companionship, guidance, advice, love and affection.

THOMPSON & MITCHELL

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IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

DAVID R. WOLTERING, Administrator of the Estate of Stacey Lee Grace, deceased,	)	
Plaintiff,	)	Case No. 90-L-193
v.	)	
OUTBOARD MARINE CORPORATION,	)	
Defendant.	)	

COMPLAINT

COUNT I

Comes now the plaintiff, DAVID R. WOLTERING, Administrator of the Estate of Stacey Lee Grace, deceased, by his attorneys, COX & GREGORY and BARBARA S. JOINER, and complaining of the defendant, OUTBOARD MARINE CORPORATION, states:

1. Plaintiff is the duly appointed, qualified and acting Administrator of the estate of Stacey Lee Grace, deceased, pursuant to Order entered and Letters of Office issued by the Circuit Court of the Third Judicial Circuit, Madison County, Illinois. A copy of said Letters of Office is attached hereto, marked "Exhibit A", and made a part hereof.

2. Plaintiff brings this action as such Administrator pursuant to, and as authorized, by the Illinois Wrongful Death Act, Chapter 70, Paragraphs 1 and 2, of the Illinois Revised Statutes, on behalf of and for the benefit of her parents and next of kin of the decedent.

3. Plaintiff is a resident of Madison County, Illinois.

4. Defendant, Outboard Marine Corporation, is a Delaware corporation with its principal place of business in Waukegan, Illinois.

5. Defendant, Outboard Marine Corporation, transacts business within the State of Illinois, and does business within Madison County, Illinois.

6. On April 27, 1989, at approximately 4:00 p.m., decedent was a passenger in a boat operated by Timothy Heuer on the Mississippi River at or near mile marker 222, in St. Charles County, Missouri.

7. On said date and time, decedent was thrown from the boat and struck by the boat's outboard motor propeller, which injuries caused the death of the decedent on April 27, 1989.

8. Prior and subsequent to April 27, 1989, defendant, Outboard Marine Corporation, was ordinarily engaged in the manufacturing, designing, assembling, selling, furnishing or supplying of Evinrude outboard boat motors, and did, in fact, manufacture, design, assemble, sell, furnish or supply the Evinrude outboard boat motor involved in the occurrence made the basis of this suit.

9. The Evinrude outboard boat motor manufactured, designed, assembled, sold, furnished or supplied by defendant, Outboard Marine Corporation, involved in this suit was in a defective, and hence unreasonably dangerous, condition on the date of the occurrence made the basis of this suit, in that it lacked a propeller guard or shroud.

10. The unreasonably dangerous and defective condition of the Evinrude outboard boat motor manufactured, designed, assembled, sold, furnished or supplied by defendant, Outboard Marine Corporation, was the proximate cause of the injuries to plaintiff's decedent and her subsequent death.

11. The unreasonably dangerous and defective condition of the Evinrude outboard boat motor manufactured, designed, assembled, sold, furnished or supplied by defendant, Outboard Marine Corporation, existed at the time that the product left the defendant's control.

12. Plaintiff's decedent left as survivors: her father, David R. Woltering; her mother, Doris M. Woltering; and her sister, Sheila Martin.

13. By reason of the death of the decedent, the aforementioned heirs and next of kin of the decedent have, and each of them has, been deprived of large sums of money and valuable services which decedent was accustomed to contribute and perform, and which she would have continued to perform in the future but for her death. The aforementioned heirs and next of kin of decedent have also been deprived of the companionship, guidance, advice, love and affection of the decedent.

WHEREFORE, plaintiff, DAVID R. WOLTERING, as Administrator of the Estate of Stacey Lee Grace, deceased, demands judgment against defendant, OUTBOARD MARINE CORPORATION, in an amount in excess of Fifteen Thousand Dollars ($15,000.00), and costs of suit.

DAVID R. WOLTERING,
Administrator of the Estate of Stacey Lee Grace, deceased, Plaintiff

PLAINTIFF DEMANDS A TRIAL BY JURY OF THIS CAUSE

BY: /s/ Robert H. Gregory
ROBERT H. GREGORY
#03122358
Cox & Gregory
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East Alton, IL 62024
(618) 259-4551

/s/ Barbara S. Joiner
BARBARA S. JOINER
#03123225
2 Center Grove Road
Edwardsville, IL 62025
(618) 692-0406

COUNT II

Comes now the plaintiff, DAVID R. WOLTERING, Administrator of the Estate of Stacey Lee Grace, deceased,

by his attorneys, COX & GREGORY and BARBARA S. JOINER, and complaining of the defendant, OUTBOARD MARINE CORPORATION, states:

1. Plaintiff is the duly appointed, qualified and acting Administrator of the estate of Stacey Lee Grace, deceased, pursuant to Order entered and Letters of Office issued by the Circuit Court of the Third Judicial Circuit, Madison County, Illinois. A copy of said Letters of Office is attached hereto, marked "Exhibit A", and made a part hereof.

2. Plaintiff, as Administrator of the estate of Stacey Lee Grace, brings this action to recover damages resulting from injuries to the person and property of the decedent pursuant to the common law and pursuant to the Illinois Survival Statute, Chapter 110-1/2, Paragraph 27-6 of the Illinois Revised Statutes.

3. Plaintiff is a resident of Madison County, Illinois.

4. Defendant, Outboard Marine Corporation, is a Delaware corporation with its principal place of business in Waukegan, Illinois.

5. Defendant, Outboard Marine Corporation, transacts business within the State of Illinois, and does business within Madison County, Illinois.

6. On April 27, 1989, at approximately 4:00 p.m., decedent was a passenger in a boat operated by Timothy Heuer on the Mississippi River at or near mile marker 222, in St. Charles County, Missouri.

7. On said date and time, decedent was thrown from the boat and struck by the boat's outboard motor propeller, which injuries caused the death of the decedent on April 27, 1989.

8. Prior and subsequent to April 27, 1989, defendant, Outboard Marine Corporation, was ordinarily engaged in the manufacturing, designing, assembling, selling, furnishing or supplying of Evinrude outboard boat motors, and did, in fact, manufacture, design, assemble, sell, furnish or supply the Evinrude outboard boat motor involved in the occurrence made the basis of this suit.

9. The Evinrude outboard boat motor manufactured, designed, assembled, sold, furnished or supplied by defendant, Outboard Marine Corporation, involved in this suit was in a defective, and hence unreasonably dangerous, condition on the date of the occurrence made the basis of this suit, in that it lacked a propeller guard or shroud.

10. The unreasonably dangerous and defective condition of the Evinrude outboard boat motor manufactured, designed, assembled, sold, furnished or supplied by defendant, Outboard Marine Corporation, was the proximate cause of the injuries to plaintiff's decedent and her subsequent death.

11. The unreasonably dangerous and defective condition of the Evinrude outboard boat motor manufactured, designed, assembled, sold, furnished or supplied by defendant, Outboard Marine Corporation, existed at the time that the product left the defendant's control.

12. As a direct and proximate result of the unreasonably dangerous condition of the Evinrude outboard boat motor manufactured, designed, assembled, sold, furnished or supplied by defendant, Outboard Marine Corporation, decedent suffered severe lacerations to her right upper chest, abdomen, and right hip, for which she was hospitalized and placed under trauma unit medical care until she died as a result of her injuries. Until her death, decedent suffered great physical pain and mental anguish. Decedent further incurred substantial hospital, medical, nursing, and funeral expenses by reason of her injuries and resulting death.

WHEREFORE, plaintiff, DAVID R. WOLTERING, as Administrator of the Estate of Stacey Lee Grace, deceased, demands judgment against defendant, OUTBOARD MARINE CORPORATION, in an amount in excess of Fifteen Thousand Dollars ($15,000.00), and costs of suit.

DAVID R. WOLTERING,
Administrator of the Estate of Stacey Lee Grace, deceased, Plaintiff

PLAINTIFF DEMANDS A TRIAL BY JURY OF THIS CAUSE

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COUNT III

Comes now the plaintiff, DAVID R. WOLTERING, Administrator of the Estate of Stacey Lee Grace, deceased, by his attorneys, COX & GREGORY and BARBARA S. JOINER, and complaining of the defendant, OUTBOARD MARINE CORPORATION, states:

1. Plaintiff is the duly appointed, qualified and acting Administrator of the estate of Stacey Lee Grace, deceased, pursuant to Order entered and Letters of Office issued by the Circuit Court of the Third Judicial Circuit, Madison County, Illinois. A copy of said Letters of Office is attached hereto, marked "Exhibit A", and made a part hereof.

2. Plaintiff brings this action as such Administrator pursuant to, and as authorized, by the Illinois Wrongful Death Act, Chapter 70, Paragraphs 1 and 2, of the Illinois Revised Statutes, on behalf of and for the benefit of her parents and next of kin of the decedent.

3. Plaintiff is a resident of Madison County, Illinois.

4. Defendant, Outboard Marine Corporation, is a Delaware corporation with its principal place of business in Waukegan, Illinois.

5. Defendant, Outboard Marine Corporation, transacts business within the State of Illinois, and does business within Madison County, Illinois.

6. On April 27, 1989, at approximately 4:00 p.m., decedent was a passenger in a boat operated by Timothy Heuer on the Mississippi River at or near mile marker 222, in St. Charles County, Missouri.

7. On said date and time, decedent was thrown from the boat and struck by the boat's outboard motor propeller, which injuries caused the death of the decedent on April 27, 1989.

8. Prior and subsequent to April 27, 1989, defendant, Outboard Marine Corporation, was ordinarily engaged in the manufacturing, designing, assembling, selling, furnishing or supplying of Evinrude outboard boat motors, and did, in fact, manufacture, design, assemble, sell, furnish or supply the Evinrude outboard boat motor involved in the occurrence made the basis of this suit.

9. Defendant, Outboard Marine Corporation, negligently manufactured, designed, assembled, sold, furnished or supplied the Evinrude outboard boat motor involved in this suit in one or more of the following respects:

(a) Negligently manufactured the outboard boat motor without a propeller guard or shroud to prevent injuries such as those suffered by decedent;

(b) Negligently designed the outboard boat motor without a propeller guard or shroud to prevent injuries such as those suffered by decedent;

(c) Negligently sold and distributed to the general public an outboard boat motor without a propeller guard or shroud to prevent injuries such as those suffered by decedent;

(d) Negligently failed to warn decedent and others of the dangers of unguarded outboard boat motor propellers.

10. That one or more of the foregoing negligent acts or omissions of defendant, Outboard Marine Corporation, was the proximate cause of the injuries to the decedent and her resulting death.

11. Plaintiff's decedent left as survivors: her father, David R. Woltering; her mother, Doris M. Woltering; and her sister, Sheila Martin.

12. By reason of the death of the decedent, the aforementioned heirs and next of kin of the decedent have, and each of them has, been deprived of large sums of money and valuable services which decedent was accustomed to contribute and perform, and which she would have continued

to perform in the future but for her death. The aforementioned heirs and next of kin of decedent have also been deprived of the companionship, guidance, advice, love and affection of the decedent.

WHEREFORE, plaintiff, DAVID R. WOLTERING, as Administrator of the Estate of Stacey Lee Grace, deceased, demands judgment against defendant, OUTBOARD MARINE CORPORATION, in an amount in excess of Fifteen Thousand Dollars ($15,000.00), and costs of suit.

DAVID R. WOLTERING,
Administrator of the Estate of Stacey Lee Grace, deceased, Plaintiff

PLAINTIFF DEMANDS A TRIAL BY JURY OF THIS CAUSE

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/s/ Barbara S. Joiner
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COUNT IV

Comes now the plaintiff, DAVID R. WOLTERING, Administrator of the Estate of Stacey Lee Grace, deceased, by his attorneys, COX & GREGORY and BARBARA S. JOINER, and complaining of the defendant, OUTBOARD MARINE CORPORATION, states:

1. Plaintiff is the duly appointed, qualified and acting Administrator of the estate of Stacey Lee Grace, deceased, pursuant to Order entered and Letters of Office issued by the Circuit Court of the Third Judicial Circuit, Madison County, Illinois. A copy of said Letters of Office is attached hereto, marked "Exhibit A", and made a part hereof.

2. Plaintiff, as Administrator of the estate of Stacey Lee Grace, brings this action to recover damages resulting from injuries to the person and property of the decedent pursuant to the common law and pursuant to the Illinois Survival Statute, Chapter 110-1/2, Paragraph 27-6 of the Illinois Revised Statutes.

3. Plaintiff is a resident of Madison County, Illinois.

4. Defendant, Outboard Marine Corporation, is a Delaware corporation with its principal place of business in Waukegan, Illinois.

5. Defendant, Outboard Marine Corporation, transacts business within the State of Illinois, and does business within Madison County, Illinois.

6. On April 27, 1989, at approximately 4:00 p.m., decedent was a passenger in a boat operated by Timothy Heuer on the Mississippi River at or near mile marker 222, in St. Charles County, Missouri.

7. On said date and time, decedent was thrown from the boat and struck by the boat's outboard motor propeller, which injuries caused the death of the decedent on April 27, 1989.

8. Prior and subsequent to April 27, 1989, defendant, Outboard Marine Corporation, was ordinarily engaged in the manufacturing, designing, assembling, selling, furnishing or supplying of Evinrude outboard boat motors, and did, in fact, manufacture, design, assemble, sell, furnish or supply the Evinrude outboard boat motor involved in the occurrence made the basis of this suit.

9. Defendant, Outboard Marine Corporation, negligently manufactured, designed, assembled, sold, furnished or supplied the Evinrude outboard boat motor involved in this suit in one or more of the following respects:

(a) Negligently manufactured the outboard boat motor without a propeller guard or shroud to prevent injuries such as those suffered by decedent;

(b) Negligently designed the outboard boat motor without a propeller guard or shroud to prevent injuries such as those suffered by decedent;

(c) Negligently sold and distributed to the general public an outboard boat motor

without a propeller guard or shroud to prevent injuries such as those suffered by decedent;

(d) Negligently failed to warn decedent and others of the dangers of unguarded outboard boat motor propellers.

10. That one or more of the foregoing negligent acts or omissions of defendant, Outboard Marine Corporation, was the proximate cause of the injuries to the decedent and her resulting death.

11. As a direct and proximate result of the negligent acts or omissions of defendant, Outboard Marine Corporation, as hereinabove alleged, decedent suffered severe lacerations to her right upper chest, abdomen, and right hip, for which she was hospitalized and placed under trauma unit medical care until she died as a result of her injuries. Until her death, decedent suffered great physical pain and mental anguish. Decedent further incurred substantial hospital, medical, nursing, and funeral expenses by reason of her injuries and resulting death.

WHEREFORE, plaintiff, DAVID R. WOLTERING, as Administrator of the Estate of Stacey Lee Grace, deceased, demands judgment against defendant, OUTBOARD MARINE CORPORATION, in an amount in excess of Fifteen Thousand Dollars ($15,000.00), and costs of suit.

DAVID R. WOLTERING,
Administrator of the Estate of Stacey Lee Grace, deceased, Plaintiff

PLAINTIFF DEMANDS A TRIAL BY JURY OF THIS CAUSE

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JONES ACT
46 U.S.C. app. § 688 (1988)

§ 688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b) Limitation for certain aliens; applicability in lieu of other remedy

(1) No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred -- (A) while that person was in the employ of an enterprise engaged in the exploration, development, or

production of off-shore mineral or energy resources--including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and (B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in article I of the 1958 Convention on the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person -- (A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or (B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

DEATH ON THE HIGH SEAS ACT
46 U.S.C. app. §§ 761-67 (1988)

§ 761. Right of action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

§ 762. Amount and apportionment of recovery

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

§ 764. Rights of action given by laws of foreign countries

Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

§ 765. Death of plaintiff pending action

If a person die [sic] as the result of such wrongful act, neglect, or default as is mentioned in section 761 of this title during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the recovery of the compensation provided in section 762 of this title.

§ 766. Contributory negligence

In suits under this chapter the fact that the decedent has been guilty of contributory negligence shall not bar recovery, but the court shall take into consideration the degree of negligence attributable to the decedent and reduce the recovery accordingly.

§ 767. Exceptions from operation of chapter

The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.

§ 704.Appendix A Public Bodies of Water

The following public bodies of water were navigable in their natural condition or were improved for navigation and opened to public use. The entire length and surface area in Illinois, including all backwater lakes and sloughs open to the main channel or body of water at normal flows or stages, are open to the public unless limited to a head of navigation as stated. Head of navigation descriptions use the U.S. rectangular survey system and these abbreviations: T = township, R = range, PM = principle meridian, Sec. = section, 1/4 = quarter section, N = north, E = east, S = south, W = west, USGS = U.S. Geological Survey.

1) Lake Michigan;

2) Chicago River: Main Branch;

3) Chicago River: North Branch to North Shore Channel;

4) Chicago River: South Branch;

5) Chicago River: South Fork of South Branch;

6) Chicago River: East and West Arms of South Fork of South Branch;

7) Chicago River: West Fork of South Branch to Chicago Sanitary and Ship Canal;

8) Calumet River;

9) Lake Calumet and entrance channel to Calumet River;

10) Grand Calumet River;

11) Little Calumet River;

12) Wolf Lake (Cook County);

13) Mississippi River (including all backwater lakes such as Frentress Lake in Jo Daviess County, Boston Bay in Mercer County and Quincy Bay in Adams County);

14) Sinsiniwa River to North Line of Sec. 9, T28N, R1W, 4th PM in Jo Daviess County, which is located approximately two-thirds mile downstream from the U.S. Highway 20 bridge. This area is shown on the Galena, Ill.-Iowa, 7.5 minute USGS quadrangle map;

15) Galena River to East Line of Sec. 6, T28N, R1E, 4th PM in Jo Daviess County, which is located approximately one-half mile upstream from the County Highway 67 bridge.

This area is shown on the Galena, Ill.-Iowa, 7.5 minute USGS quadrangle map;

16) Apple River to North Line of Sec. 35, T26N, R2E, 4th PM in Jo Daviess County;

17) Plum River to North Line, T24N, R3E, 4th PM in Carroll County, which is located approximately one and one-half miles upstream from the U.S. Highway 52 bridge. This area is shown on the Savanna, Ill., 15 minute USGS quadrangle map;

18) Rock River;

19) Pecatonica River;

20) Sugar River (Winnebago County);

21) Stillman Creek to South Line, T25N, R11E, 4th PM in Ogle County, which is located approximately one-third mile downstream from the Illinois Highway 72 bridge. This area is shown on the Stillman Valley, 7.5 minute USGS quadrangle map;

22) Henderson Creek (new channel) to East Line, SW 1/4, Sec. 6, T10N, R5W, 4th PM in Henderson County. The river has been relocated and the old channel abandoned.

23) The Sny in Adams, Pike and Calhoun Counties. The area has been drained with levees and ditches and it is uncertain that any descendent body of water exists;

24) Bay Creek to West Line, Sec. 29, T8S, R3W, 4th PM in Calhoun County. The head of navigation is the limit of meanders on the official plat of survey; but it is uncertain that any descendent body of water exists;

25) Illinois River (including all backwater lakes such as Peoria Lake in Peoria, Tazewell and Woodford Counties; Matanzas Bay in Mason County; and Meredosia Lake in Cass and Morgan Counties);

26) Des Plaines River to Hoffman Dam in Cook County, which is located one-half mile downstream from the junction with Salt Creek. This area is shown on the Berwyn, 7.5 minute USGS quadrangle map;

27) Kankakee River;

28) Iroquois River to South Line, SW 1/4, Sec. 30, T27N, R12W, 2nd PM in Iroquois County, which is located approximately one mile downstream from the junction with Sugar Creek.

This area is shown on the Gilman, 15 minute USGS quadrangle.

29) Fox River (Illinois River Basin);

30) Griswold Lake (McHenry County);

31) Fox Chain-O-Lakes (Lake and McHenry Counties): Bluff Lake, Lake Catherine, Channel Lake, Fox Lake, Grass Lake, Lake Marie, Nippersink Lake, Dunns Lake, Pistakee Lake, Lake Jerilyn, Lac Louette, Redhead Lake;

32) Vermilion River (Illinois River Basin) to approximately one-half mile above the mouth near Oglesby in LaSalle County;

33) Spring Lake (Tazewell County);

34) Spoon River to North Line, Sec. 24, T6N, R1E, 4th PM in Fulton County, which is located approximately one-half mile upstream from the Illinois Highway 95 bridge. This area is shown on the Smithfield, 7.5 minute USGS quadrangle map;

35) Sangamon River to South Line, NE 1/4, Sec. 1, T15N, R4W, 3rd PM in Sangamon County, which is located approximately one mile south of the Mechanicsburg Road bridge. This

area is shown on the Mechanicsburg, 7.5 minute USGS quadrangle map;

36) Sangamon River: South Fork to South Line, Sec. 33, T16N, R4W, 3rd PM in Sangamon County, which is located approximately two miles upstream from the mouth. This area is shown on the Springfield-East, 7.5 minute USGS quadrangle map;

37) Macoupin Creek to East Line, Sec. 25, T9N, 413W, 3rd PM in Green and Jersey Counties, which is located approximately one mile downstream from the junction with Boyer Creek. This area is shown on the Boyer Creek, 7.5 minute USGS quadrangle map;

38) Otter Creek to East Line of Sec. 3, T7N, R13W, 3rd PM in Jersey County, which is located approximately two miles east of the Illinois Highway 100 bridge. This area is shown on the Nutwood, 7.5 minute USGS quadrangle map;

39) Kaskaskia River to East Line, SW 1/4, Sec. 31, T8N, R2E, 3rd PM, which is located nine miles south and two miles west of Herrick. This area is shown on the Vera, 7.5 minute USGS quadrangle map;

40) Big Muddy River to East Line T8S, R2W, 3rd PM in Jackson County, which is located approximately one mile northwest of the Southern Illinois Airport. This area is shown on the Murphysboro, 7.5 minute USGS quadrangle map;

41) Ohio River;

42) Wabash River;

43) Vermilion River (Wabash River Basin) to West Line, T19N, R11W, 2nd PM in Vermilion County, which is located approximately one mile upstream from the junction with the North Fork. This area is shown on the Danville, SW, 7.5 minute USGS quadrangle map;

44) Little Wabash River to the Illinois Highway 1 bridge in Carmi in White County;

45) Saline River to junction of North Ford and South Fork;

46) Saline River: North Fork to North Line, Sec. 5, T8S, R8E, 3rd PM in Gallatin County, which is located approximately three miles south of the junction of Illinois Highway 141 and U.S. Highway 45. This area is shown

on the Ridgway, 7.5 minute USGS quadrangle map;

47) Saline River: South Fork to West Line, T9S, R8E, 3rd PM in Gallatin County, which is located at the Gallatin-Saline County line. This area is shown on the Equality, 7.5 minute USGS quadrangle map;

48) Horseshoe Lake (Alexander County).

IN THE SUPREME COURT OF ALABAMA

1920544

THOMASINE CHOAT APPELLANT

V.

KAWASAKI MOTORS CORPORATION;
KAWASAKI HEAVY INDUSTRIES, LTD.;
KAWASAKI MOTORS MANUFACTURING
CORPORATION, APPELLEES

APPEAL FROM THE CIRCUIT COURT OF COLBERT COUNTY, ALABAMA

APPELLANT'S MOTION TO ENLARGE TIME TO SUPPLEMENT ARGUMENT AND TABLE OF AUTHORITIES

Comes now the appellant, Thomasine Choat, and pursuant to Ala. R. App. P. 26(b), moves this Honorable Court to permit appellant to supplement her argument and table of authorities to include Woltering v. Outboard Marine Corp., No. 5-92-0248 (Ill. App. Ct., June 16, 1993), a copy of which is attached hereto as Exhibit A, and the Supplemental Argument of Appellant, attached hereto as Exhibit B. In support of this motion, appellant states:

(1) that Woltering is directly relevant to appellant's argument regarding the lack of admiralty jurisdiction in the present case;

(2) that Woltering was decided after the conclusion of the briefing schedule in the present case;

(3) that Woltering came to appellant's attention only in the past week; and

(4) that appellant obtained a copy of Woltering and prepared this motion as soon as possible after learning of the existence of said opinion.

WHEREFORE, appellant moves this Honorable Court to permit the supplementation of appellant's argument and table of authorities with documents attached hereto as Exhibits A and B.

/s/ R. Ben Hogan
R. BEN HOGAN, III
ATTORNEY FOR APPELLANT

OF COUNSEL:

HOGAN, SMITH, ALSPAUGH,
SAMPLES & PRATT, P.C.
2323 Second Avenue North
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Telephone: (205) 324-5635

EXHIBIT A

Exhibit A is the opinion of the Illinois Appellate Court, Fifth District. The opinion is located at App. A1-A7, *supra*, so it has not been reproduced here.

EXHIBIT B

SUPPLEMENTAL ARGUMENT OF APPELLANT
CHOAT V. KAWASAKI MOTORS CORP., ET AL.,
No. 1920544

In the present case, the appellant's decedent was floating on an inflatable raft when she was struck by a jet ski designed, manufactured, marketed, and sold by appellees. Appellant has previously argued that the trial court erred in holding that admiralty jurisdiction was proper in this case because, among other things, there was no showing that the wrong alleged bore a significant relationship to traditional maritime activity. See Brief for Appellant at 14-17; Reply Brief for Appellant at 7-11.

The Appellate Court of Illinois, Fifth District, recently decided a similar case in which a passenger of a boat was killed when she was thrown from the boat and struck by the boat's propeller. Woltering v. Outboard Marine Corp., No. 5-92-0248 (Ill. App. Ct., June 16, 1993). In Woltering the plaintiffs claimed that the boat motor propeller that struck the plaintiffs' decent was defective and unreasonably dangerous because it was not equipped with a propeller guard. The defendant product manufacturer argued, as appellees do in the present case, that admiralty jurisdiction was proper and that under maritime law, plaintiffs could not recover because they were not dependent upon the decedent. The Illinois court determined that where "the relevant activity giving rise to the incident was aquatic recreation involving a pleasure boat," there was no significant relationship to traditional maritime activity, and admiralty jurisdiction was improper. Woltering, slip op. at 4-5.

As in Woltering, the present case involves aquatic recreation and a claim that is based on the unreasonably dangerous nature of the defective design of the product that struck appellant's decedent. Furthermore, the present case, like Woltering, does not involve negligent navigation. In other words, the activity involved in the present case does not bear a significant relationship to traditional maritime activity. Therefore, admiralty jurisdiction was improperly invoked by the trial court. Appellant urges this Court to reverse the judgment of the trial court and to remand this case for trial on the merits applying the wrongful death law of the State of Alabama.

Respectfully submitted,

/s/ R. Ben Hogan
R. BEN HOGAN, III

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing APPELLANT'S MOTION TO ENLARGE TIME TO SUPPLEMENT ARGUMENT AND TABLE OF AUTHORITIES has been served on the following attorneys by placing same in the United States mail, properly addressed and postage prepaid, this 7 day of Sept, 1993:

W. Stancil Starnes, Esquire
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/s/ R. Ben Hogan
Of Counsel